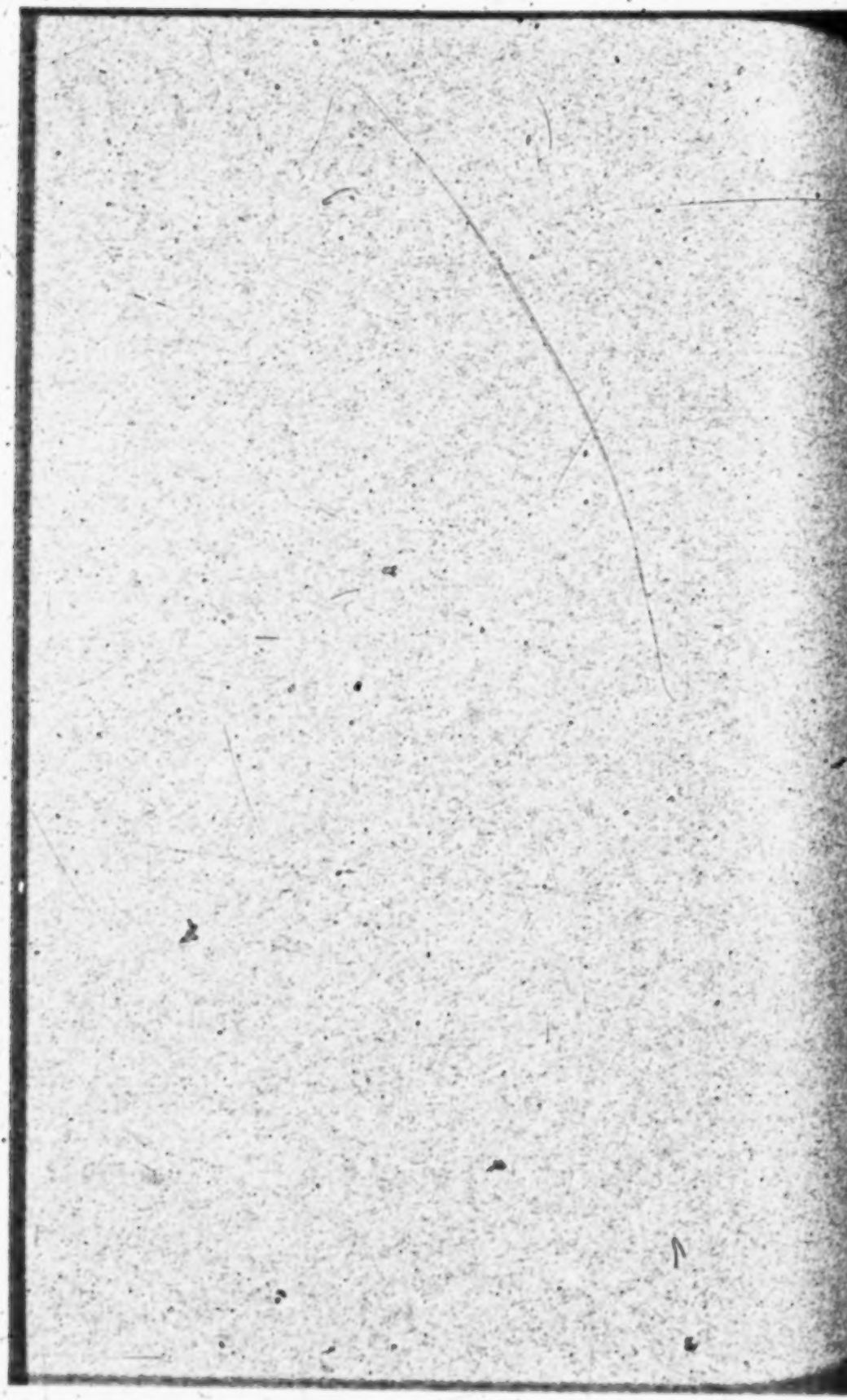

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No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1930

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND Harold A. Hatch, Executors of the Estate of Seth M. Milliken, Deceased, petitioners

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 16) is reported in 69 C. Cls. 231 and 38 F. (2d) 381.

JURISDICTION

The judgment of the Court of Claims was entered February 17, 1930. (R. 29.) The petition for a writ of certiorari was filed April 19, 1930, and the writ was granted October 13, 1930. (R. 30, 31.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the value of property gratuitously transferred in contemplation of death, prior to the enactment of the Revenue Act of 1918 but after the enactment of the Revenue Act of 1916, may constitutionally be included in the gross estate of the transferor who died on March 5, 1920, and taxed at the rates imposed by either of the Acts.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 17–20.

STATEMENT

In December, 1916, while the Revenue Act of 1916 was in force, Seth M. Milliken gave certain stock to his three children. (R. 15.) The Commissioner of Internal Revenue determined that this transfer was made in contemplation of death, and the petitioners have waived any right to assert that it was not so made. (R. 15.) The transferor died on March 5, 1920, after the enactment of the Revenue Act of 1918. (R. 15.)

The petitioners, executors of his estate, did not include the value of this stock in the decedent's gross estate in their Federal estate tax return. (R. 15.) The Commissioner of Internal Revenue assessed an additional tax, of which $812,165.42 resulted from the inclusion in the gross estate of this stock at its value at the time of the decedent's death. (R. 15.) This was done pursuant to the

provisions of Section 402 (c) of the Revenue Act of 1918 on the ground that the transfer was a gift made by the decedent in contemplation of death. (R. 15.)

The petitioners paid the additional tax and in due time filed a claim for refund of $812,165.42, the amount of the tax on the transfer of the stock. (R. 15, 16.) This claim was rejected by the Commissioner and this suit brought in the Court of Claims. That court dismissed the petition. (R. 16.)

SUMMARY OF ARGUMENT

I. Section 402 (c) of the Revenue Act of 1918 expressly taxes the transfer in the instant case. The language of the statute leaves no doubt but that Congress intended to tax a transfer in contemplation of death, whether the transfer was made before or after the passage of the Act. The petitioners' argument as to the construction of this section was not raised in the court below and is not open for argument in this Court.

II. The due process clause of the Fifth Amendment does not invalidate the application of Section 402 of the Revenue Act of 1918 to the transfer in the instant case. The transfer was in contemplation of death. The tax, if levied upon a transfer made after the date of the enactment of the statute, is constitutional. The tax is upon the testamentary disposition of the decedent's property. A gift in contemplation of death is a part of this disposition.

III. The fact that the transfer was made before the enactment of the statute does not render it arbitrary. The statute was a continuance of similar provisions in the Revenue Act of 1916 which was in force when the transfer was made. No tax was placed upon an act nontaxable when done. That the transferor could not calculate the exact rate of the tax when he made the gift does not make the tax unconstitutional.

IV. In any case, the property transferred is taxable at the lower rate prescribed by the Revenue Act of 1916. Congress intended the estate tax provisions of the 1916 Act to remain in force in every case until the provisions of the 1918 Act applied to the estate in that case.

ARGUMENT

I

CONGRESS INTENDED BY SECTION 402 (c) OF THE REVENUE ACT OF 1918 TO TAX TRANSFERS SUCH AS THAT IN THE INSTANT CASE

In the instant case the Commissioner included in the gross estate certain stock which he found had been transferred as a gift in contemplation of death. (R. 15.) The burden is consequently on the taxpayer to show that the Commissioner's determination that the gift was in contemplation of death was not correct. See *Wickwire* v. *Reinecke*, 275 U. S. 101; *Reinecke* v. *Spaulding*, 280 U. S. 227. The petitioners have not met this burden, for they "have waived any right to assert

that the transfer * * * was not as a matter of fact a transfer by the decedent in contemplation of death." (R. 15.)

By Section 402 (c) of the Revenue Act of 1918 (*infra*, p. 19), there is included in the gross estate and thus made subject to the estate tax any interest in property

> of which the decedent has at any time made a transfer * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer * * * is made * * * before or after the passage of this Act) * * *.

The petitioners contend that this language does not include the transfer in the instant case. They read Section 402 (c) as taxing transfers in contemplation of death *only* if the transfers are also intended to take effect in possession or enjoyment at or after death. The chief authority cited for this construction is *Spangler's Estate*, 281 Pa. 118. But this case does not support the petitioners' contention because the taxing statute under the applicable provision of the Pennsylvania Constitution could apply only to a transfer of property passing at the time of death. The other cases cited by the petitioners (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Chase National Bank* v. *United States*, 278 U. S. 327; *May* v. *Heiner*, 281 U. S. 238) did not involve a gift in contemplation of death, and the question of taxability depended upon

whether there had been a transfer to take effect upon death. Under the construction urged by the petitioners the phrase "in contemplation of" in Section 402 (c) is entirely superfluous and could be omitted. We submit that this phrase is not mere repetition but was placed in the statute by Congress avowedly and with a meaning distinct from that of the language following it.

Moreover, the petitioners are not in a position to urge this argument. At page 3 of their brief on the merits, the question is included in the assignments of error. But they did not raise the question in the Court of Claims nor in their petition for certiorari. The assignments of error in the petition for certiorari (R. 5) suggest no such position. This Court will not consider a question which was not presented to the court below nor assigned as error in the petition for certiorari. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240; *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

II

A TAX MAY CONSTITUTIONALLY BE IMPOSED ON GIFTS MADE IN CONTEMPLATION OF DEATH

Under Section 402 of the Revenue Act of 1918 (*infra*, p. 18), there is included in the value of the gross estate on which the estate tax is computed the value at the date of death of property transferred before death but in contemplation of death or intended to take effect at or after death. Many

of the petitioners' arguments question the constitutionality of this statute even as applied to a transfer in contemplation of death made after the passage of the taxing Act. We believe that this Court has indicated that the tax, so applied, is valid, but because of the lack of a decision directly in point we discuss the question briefly.

Elderly men frequently make substantial gifts with death and the ultimate disposition of their property in view. If the transfer is of a testamentary character, that is, if it is similar to that which the donor normally would have made by will, and differing from a transfer by will only in its irrevocable character, it falls within the meaning of the phrase, "made in contemplation of death." The principal purpose of Congress in using this language was to tax gifts or transfers which normally would be made by will or by the laws of succession but which are made irrevocably *inter vivos* with intention to avoid estate taxes.

The petitioners contend that a tax on such a transfer is unconstitutional under the Fifth Amendment, especially when the base upon which the tax is computed is the value of the transferred property, not at the date of the gift, but at the date of the death of the donor. The fact most stressed by the taxpayers in the instant case is that the basis of the tax, the value of the property at the date of death, bears no relation to the value of any property owned by the decedent at his death. But in *Chase National Bank* v. *United States*, 278 U. S.

327, and *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, the same provisions in the Revenue Act of 1921 were declared constitutional and nonconfiscatory as applied to proceeds of life insurance and trusts created to take effect upon death. Death is the final cause of the tax; Congress attempts to tax equally all testamentary dispositions, and chooses the date of death as that for valuation purposes. Only by such a means may the burden of estate taxation be distributed without discrimination. The tax on the transfer may be greater or less than a tax which Congress may choose to place upon a similar gift *inter vivos* not in contemplation of death.

The validity of a tax on gifts in contemplation of death has been uniformly upheld by the lower Federal courts. *Luscomb* v. *Commissioner*, 30 F. (2d) 818 (C. C. A. 2d); *Phillips* v. *Gnichtel*, 27 F. (2d) 662 (C. C. A. 3d), certiorari denied, 278 U. S. 636; *Schoenheit* v. *Lucas*, 44 F. (2d) 476, 488 (C. C. A. 4th); *Shwab* v. *Doyle*, 269 Fed. 321 (C. C. A. 6th), reversed on another ground, 258 U. S. 345; *Rengstorff* v. *McLaughlin*, 21 F. (2) 177 (N. D. Cal.). This Court has clearly indicated its view that such a tax is constitutional. In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, holding that the State estate tax was unconstitutional in so far as it contained a nonrebuttable presumption that all material transfers made within six years prior to death were made in contemplation of death, this Court said (p. 239):

> No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

This is, of course, equally applicable to the limits placed by the Fifth Amendment on the Federal taxing power. In *Nichols* v. *Coolidge*, 274 U. S. 531, at 542, this Court said:

> Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

In support of the provision in question, the Government relies upon the broad ground that it is an integral part of an entire taxing scheme, and it is a necessary and appropriate measure to enforce that scheme and prevent evasion of the tax. Cf. *Tyler* v. *United States*, 281 U. S. 497, 505; *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Taft* v. *Bowers*, 278 U. S. 470, 482.

III

THAT THE TRANSFER ANTEDATED THE ENACTMENT OF THE TAXING STATUTE DOES NOT RENDER THE TAX CONFISCATORY IN THIS CASE

In the instant case the gift in contemplation of death was made in December, 1916. (R. 15.) The statute under which the tax was levied, the Revenue

Act of 1918, was enacted on February 24, 1919. The transferor died on March 5, 1920. (R. 15.) The petitioners contend that on these facts the statute applies retroactively in placing a tax on this transfer, and is for that reason so arbitrary and confiscatory as to be invalid.

In considering this contention the fact that the gift was made in December, 1916, when the provisions of the Revenue Act of 1916 were in force, must be emphasized. Section 402 (c) of the 1918 Act (except for its parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act") is an exact reenactment of Section 202 (b) of the 1916 Act. (*infra*, p. 17). Such repeal and simultaneous reenactment is, as a matter of statutory construction, equivalent to a continuance of the legislation expressed in the Revenue Act of 1916. See *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1; *Campbell* v. *California*, 200 U. S. 87. See also *Fawcus Machine Co.* v. *United States*, No. 40, October term, 1930, decided January 5, 1931.

The statute is retroactive in form. But mere retroactivity in a taxing act does not render it unconstitutional, either in cases of direct taxation (*Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Cooper* v. *United States*, 280 U. S. 409) or in cases, like the present, of indirect and excise taxation, *Stockdale* v. *The Insurance Companies*, 20 Wall. 323; *Billings* v. *United States*, 232 U. S. 261; *Hecht* v. *Malley*, 265 U. S. 144.

The retroactive application of the gift tax provisions of the Revenue Act of 1924 was held invalid in *Untermyer* v. *Anderson,* 276 U. S. 440. The basis of this decision was stated in *Blodgett* v. *Holden,* 275 U. S. 142, 147:

> It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.

This reasoning is inapplicable to the instant case. At the time of this transfer in contemplation of death, the donor had reason to expect that the gift would be taxed. He was disposing finally of a material part of his property by a transfer testamentary in character—transferring it during his lifetime instead of by will. Under statutes then existing it was required to be included as part of his gross estate and was subject to a Federal estate tax. A tax, so anticipated, can scarcely be considered unreasonable or confiscatory on the authority of the gift tax cases. No new or unexpected tax is imposed upon an act nontaxable when done.

In support of their contention the petitioners rely on *Nichols* v. *Coolidge,* 274 U. S. 531. But there the transfers were not in contemplation of death; they were not testamentary dispositions of the decedent's property.

The validity of the estate tax statute, as applied to a gift in contemplation of death made prior to

the enactment of the Revenue Act under which the tax is levied, has been upheld by decisions in several of the lower Federal courts in addition to the court below. In *Schoenheit* v. *Lucas,* 44 F. (2d) 476, 488 (C. C. A. 4th), it appeared that the decedent had made gifts in contemplation of death in 1920 and 1921, prior to the effective date of the Revenue Act of 1921, and that his death occurred in 1922, subsequent to the passage of that Act. The court held that the gifts might validly be included in the decedent's gross estate and made subject to the estate tax imposed by the Revenue Act of 1921. *Nichols* v. *Coolidge,* 274 U. S. 531, *supra,* was distinguished on the ground that the gifts were testamentary in nature, and were made with full notice that the property transferred was likely to be included in the decedent's estate at the time of his death for the purposes of taxation. In *Shwab* v. *Doyle,* 269 Fed. 321 (C. C. A. 6th), the provisions of the 1916 estate tax act were construed to be retroactive, and, as so construed, were held constitutional. This Court reversed the decision upon the point of construction, 258 U. S. 529. In *Rengstorff* v. *McLaughlin,* 21 F. (2d) 177 (N. D. Cal.) it appeared that the decedent made a transfer in 1912 in contemplation of death and died in 1919 after the enactment of the Revenue Act of 1918. It was held that the gift was subject to the estate tax levied by the 1918 Act. *Loetscher* v. *Commissioner,* 14 B. T. A. 228, and *Latham* v.

Commissioner, 16 B. T. A. 48, are examples of the decisions of the Board of Tax Appeals in accord with the decision below in the instant case. There are no decisions to the contrary.

The petitioners stress the point that the rates of taxation in the 1918 Act were considerably higher than those in the 1916 Act. This is pertinent only in demonstrating that at the time of the transfer the donor could not have computed the tax to be levied on that transfer, and so was not given the opportunity of weighing the advisability of making the gift in the light of the exact amount of the tax which was to be placed upon it. But in no case can the donor of a gift in contemplation of death compute the tax in advance. His gross estate may double between that date and the date of his death, so that even if the same taxing statute is in force his estate tax may, under the graduated rates prescribed by the statute, be at a higher rate than he expected.

Moreover, in a very similar case, this point has been considered by this Court and the constitutionality of the tax upheld. In *Hecht* v. *Malley,* 265 U. S. 144, associations known as "Massachusetts Trusts" were held not subject to the tax imposed by the special corporation excise-tax provisions in the Revenue Act of 1916. But such associations were expressly taxed under the similar provisions in the 1918 Act. This Court held that taxes unlawfully collected under the 1916 Act could be retained

by the United States as part payment of taxes retroactively assessed for the same period under the provisions of the 1918 Act. This 1918 tax was, like that in the instant case, an excise tax and was retroactive in that its rates were higher than those in the similar provisions of the 1916 Act which it superseded. Every objection urged by the petitioners in the instant case applies equally to the tax upheld in the *Hecht case*. There this Court said (p. 164):

> In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States.

IV

IF THE PROVISIONS OF THE REVENUE ACT OF 1918 CAN NOT CONSTITUTIONALLY BE APPLIED TO THIS TRANSFER, IT WAS IN ANY EVENT TAXABLE UNDER THE REVENUE ACT OF 1916 AND THE PETITIONERS ARE NOT ENTITLED TO THE REFUND SOUGHT

The applicable provisions of the 1916 and 1918 Revenue Acts are identical except for the clause in the later Act, "whether such transfer or trust is made or created before or after the passage of this Act," and with the further exception that the rates of the tax imposed by the 1918 Act are higher than those under the 1916 Act.

By Section 1400 of the 1918 Act (*infra*, pp. 19–20) the applicable provisions of all the earlier statutes were repealed, but it was provided that—

> Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * *. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

We submit that the intent of Congress is unmistakably expressed that Section 202 (b) of the 1916 Act should remain in force until Section 402 (c) of the 1918 Act took effect. If the latter section is unconstitutional in its application to gifts made in contemplation of death prior to its passage, it never took effect so far as this property involved in the instant case is concerned. The gift was taxable under the earlier statute, and by the terms of the 1918 Act the earlier statute remains in effect if the 1918 Act does not apply. Even if the 1918 Act should be found to be invalid, the petitioners are entitled only to the excess of the tax at the 1918 rates over the tax at the 1916 rates.[1]

---

[1] The amendments of Section 202 (b) under the 1917 Acts were not expressly retroactive and under *Shwab* v. *Doyle*, *supra*, have no application to this transfer in December, 1916.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provides in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be

deemed to have been made in contemplation of death within the meaning of this title; * * *

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, 1149, 1150) provides in part:

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act whether a resident or nonresident of the United States:

[Here follows a table of percentages, materially higher than those in the Revenue Act of 1916.]

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or

distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

SEC. 1400. (a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b):

(1) The following titles of the Revenue Act of 1916:

* * * * *

Title II (called "Estate Tax");

* * * * *

(2) The following parts of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917:

Title III (called "Estate Tax");

Section 402 (called "Returns of Dividends").

(3) The following titles of the Revenue Act of 1917:

* * * * *

Title IX (called "War Estate Tax");

* * * * *

(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * * : *Provided further*, That the assessment and collection of all estate taxes, and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled "An Act to provide increased revenue to defray the

expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1921